NO. 92-1220

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1992

E. I. VAN HOUTEN,
Petitioner
vs.
STATE OF NEW JERSEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

E. I. VAN HOUTEN, Pro Se
298 Jerome Avenue
Oakhurst, NJ 07755
Dated: December 1, 1992

QUESTION FOR REVIEW

Do the New Jersey State Courts and the United States Courts differ in their interpretation of Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and by so doing deprive the Petitioner of substantive due process rights which result in punishment that violates the Eighth Amendment of the United States Constitution for being cruel and unusual?

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TABLE OF AUTHORITIES

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S.Ct.2909,49L.Ed2nd859 (1976)
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Hutto v. Finniy
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439US1122,99S.Ct.1035,59L.Ed.83 (1978)
Minnick v. Mississippi, 59LW4037-4042
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State v. Bernhardt, 584A2nd 854
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State v. Labrutto, 1114NJ187,198 (1989)
State v. Leavitt, 107NJ534
State v. Smith, 58NJ202 (1971)
State v. Wojtkowiak, 174NJSuper.460
(1980)

OPINION BELOW

On October 7, 1992, the Supreme Court of New Jersey issued an order denying Petitioner's Petition for Certification to review the decision of the

Superior Court of New Jersey Appellate Division. A copy of this order is attached as Appendix A.

The Superior Court of New Jersey Appellate Division issued a decision and opinion on July 16, 1992, affirming the decision of the Superior Court of New Jersey, County of Monmouth: Criminal Division. A copy of this opinion and decision is attached as Appendix B.

On August 9, 1991, the Superior Court of New Jersey, County of Monmouth: Criminal Division, found the Petitioner not guilty on a Trial De Nova and a judgment of acquittal on New Jersey Statutes Annotated 39:4-50 driving while intoxicated and 39:496 reckless driving. The Petitioner was found guilty and a judgment of conviction was issued on Trial De Nova for the offenses of 39:4-50.2 refusal to take a breathalyzer and 39:4-98 rates of speed. A copy of this opinion and decision is attached as Appendix C.

On May 31, 1991, the Municipal Court of Tinton Falls, New Jersey merged as a matter of law the reckless driving and speeding charge and found the Petitioner guilty of the refusal to take the breathalyzer test and driving while intoxicated charges. A copy of this opinion and the decision is attached as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257.

STATUTES INVOLVED

United States Constitution
Amendments: Article V, Article VI, Article VIII, and Article XIV
New Jersey State Constitution
Article I Paragraph 12
New Jersey Statutes Annotated 39:44-96, 39:4-98, 39:4-50, 39:4-50.2

STATEMENT OF FACTS

The Petitioner was arrested for allegedly violating NJSA 39:4-50 driving while intoxicated, 39:4-50.2 refusal to take breathalyzer, 39:4-96 reckless driving, and 39:4-98 exceeding limit rate of speed on March 5, 1991. Conflicting testimony was given at the Municipal Court which is recorded in the transcript of the Municipal hearing and

the transcript of the Municipal Appeal in Appendix C.

The facts are as follows:

The Petitioner was sighted coming from the opposite direction by the arresting officer who then made a U-turn and flashed his lights, and the Petitioner stopped his car. After giving the officer his credentials, he was asked to get out of the car and perform certain tests. The Petitioner contends that these tests were satisfactorily performed as was shown on the video tape taken at police headquarters in which the arresting officer testified under oath were performed in the same manner when given at the time of the arrest. The Judge at the Trial De Nova found this evidence along with the testimony of five witnesses sufficient to determine the Petitioner was not guilty of the charge of driving while intoxicated.

The Petitioner also contends that he questioned the officer at the time he was stopped for the reason for stopping him,

and the officer said he was clocked at traveling seven miles over the speed limit. When he questioned the officer on the way to the police station for making such a "big deal" for going seven miles above the speed limit, the officer replied he was going 17 miles above the speed limit. It was then that the Petitioner started to ask for an attorney and to explain that he had used his turbo after stopping for a light and had not exceeded the speed limit. He was told by the officer to "tell it to the judge", and as is shown on the video tape, his requests for an attorney were ignored.

The Petitioner believed he was entitled to some consideration when he asked for an attorney before and after the Miranda Rights had been read to him. As was determined and is stated in the transcript of the Municipal Appeal (Appendix C), he did not trust the police officer. He refused to take the breathalyzer without talking to an attorney. These issues have been raised at the Municipal hearing and upon appeal.

The Petitioner has been found guilty and is required to pay fines and penalties for violating NJSA 39:4-50.2 and 39:4-98.

ARGUMENT

The Petitioner contends that Cpl. Nace, the arresting officer, gave him different speeds each time the Petitioner inquired about the reason for stopping him. There was no other evidence submitted at Court other than the statement made by Cpl. Nace regarding the speed of the car driven by the Petitioner. At the Municipal hearing the testimony of this arresting officer stated that the police radar K55 had been checked by a tuning fork in the manner described in the State v. Wojtkowiak, 174NJSuper.460 (1980). After that the officer's testimony deviated from the procedure described in this case in that he gave absolutely no evidence that the speed of the vehicle was, in fact, recorded on radar so that it actually made little difference whether or not it had been tested. His testimony seemed to indicate that the radar was not

used at all to determine the speed of the Petitioner's vehicle. At the Trial De Nova, when this point was brought before the Honorable Judge Labrecque, Jr., there was again no evidence presented that the Petitioner had actually been speeding. Mr. Van Houten states as he did from the beginning that the officer mistook the rapid acceleration of the turbo engine for speeding when he started after stopping for a red light. Judge Labrecque, Jr., decided that the Petitioner was speeding based on sua sponte that the Petitioner was speeding. (Appendix C). The Petitioner does not believe the evidence submitted and sua sponte satisfies the requirement of proof beyond a reasonable doubt.

The testimony of Cpl. Nace regarding the actions of the Petitioner have been consistently incongruent with the video tape taken at Police Headquarters. His charge of DWI and reckless driving were without foundation.

The Judges of the Superior Court of

New Jersey Appellate Division: Honorables J. H. Coleman and Dreier cited three cases to justify the use of Cpl. Nace's testimony to prove speeding. All of these involve lay witnesses none of which were the sole evidence upon which a conviction rested. These three cases are covered in greater detail in the Appellate Brief to the Superior Court. The cases, State v. Johnson, 120NJ263,294 (1990) and State v. LaBrutto, 114NJ187,198 (1989), both deal with testimony in death by auto cases and involve footprints and point of impact of an accident, respectively; it had nothing to do with the speed of an automobile. The third case, Pierson v. Frederickson, 102NJSuper.11156,162 (App.Div. 1968), was a civil case in which the testimony given concerning the sound of an engine in the automobile was not even needed to prove liability. The Petitioner believes that the consequences of this conviction on his life and reputation deserve more of an analysis than a cursory attempt to justify them with these cases.

The testimony of the arresting officer recorded in the transcript of the Municipal Appeal Volume 1 stated that the performance of the Petitioner at the roadside were essentially consistent with his performance on the video tape taken at Police Headquarters. He had no difficulty reciting the alphabet and performing tests. The Superior Court Judge found that there was no evidence on this video tape to indicate that the Petitioner was drinking and that his performance was impaired as a result of this. The Petitioner questions where the proof beyond a reasonable doubt exists to justify probable cause for arrest.

As soon as the Petitioner was placed under arrest, he asked to consult with one of two attorneys. He was ignored when this request was made before the matter of a breathalyzer was introduced. The Petitioner believed he was entitled to consult with an attorney. This issue was raised in the Courts earlier and was not addressed in the context of when the requests were made. These were not the

facts in the State v. Leavitt, 107NJ534, where "at no time . . . . during the video taping did the defendant request an attorney be provided to him after being advised of his rights." It is difficult for Petitioner to understand how a seasoned criminal such as Robert S. Minnick of Minnick v. Mississippi, 59LW4037-4042 (12/3/90) is entitled to the right to have an attorney present at the time of his arrest and the Petitioner was not allowed to make a single phone call. Not only was Cpl. Nace permitted to remain silent when this request was made, but also he was allowed to continue questioning and directing the Petitioner as if he had not spoken at all. Not only is this confusing but it is an illustration of a total lack of respect. The vital rights preserved by Minnick have little to do with whatever rights other citizens may have.

Although New Jersey does not have rights such as those included in the Fifth Amendment of the United States Constitution, it does have Paragraph 12 of Article I in the New Jersey Constitution which

prohibits cruel and unusual punishment. The penalty for the offenses described above not only include fines and thousands of dollars of insurance surcharges but the Petitioner is subject to the status of possible second and third offender for 20 years. This means he is subject to additional thousands of dollars of fines and insurance surcharges and jail term for at least 80 days. All persons found guilty of refusal to take the breathalyzer when they have been found not guilty of driving while under the influence are required to attend alcohol rehabilitation programs. As in the Petitioner's case, it was determined that he was not under the influence of alcohol, and to require him to attend meetings of this type is a violation of the Eighth Amendment prohibiting cruel and unusual punishment and is greatly disproportionate to the offense which is prohibited in State v. Smith, 58NJ202 (1971). Punishment may not be grossly disproportionate to the severity of the crime as in Gregg v. Georgia, 428US253, 96S.Ct.2909,49L.Ed.2nd859 (1976). The Eighth Amendment ban on

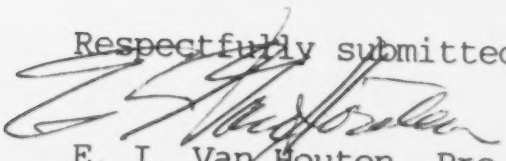
infliction of cruel and unusual punishment has been found applicable to the States through the Fourteenth Amendment, Hutto v. Finniy, 437US678, 98S.Ct. 2565, 57 L.Ed. 2nd 522 (1978) reh. den. 439US1122, 99 S.Ct. 1035, 59L.Ed.83 (1978).

The Petitioner, E. I. Van Houten, asks that the Court consider these issues which he believes to be unfair. The State's case is based upon a generality that when one's breath has the odor of alcohol, he is an alcoholic and is to be treated as such. It is indeed a sad commentary on the times when these events occurred a few miles from where the Petitioner has lived for over twenty years, a little further from where he worked for thirty four years, and at this time in his life he finds it necessary to go to the United States Supreme Court to find the neighborliness which is so noticeably lacking among some segments of our communities.

CONCLUSION

Petitioner, E. I. Van Houten, prays that a Writ of Certiorari be issued to review the decision of the Superior Court of New Jersey Appellate Division and that this Court take whatever action it may deem appropriate to remedy this injustice.

Respectfully submitted,



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SUPREME COURT OF NEW JERSEY

C-191 September Term 1992

35,652

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDGAR VAN HOUTEN,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

F I L E D

Oct. 7, 1992

Stephen W. Townsend

CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-342-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on

this 5th day of October, 1992.

Signature: Stephen W. Townsend
CLERK OF THE SUPREME COURT
I hereby certify that the foregoing
is a true copy of the original on file
in my office.

Signature: Stephen W. Townsend
CLERK OF THE SUPREME COURT OF NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-0342-91T3

STATE OF NEW JERSEY
Plaintiff-Respondent,
v.
EDGAR VAN HOUTEN,
Defendant-Appellant.

ORIGINAL FILED
Jul.16, 1992
Emille R. Cox, Esq.
CLERK

Submitted July 7, 1992. Decided Jul. 16, 1992
Before Judges J. H. Coleman and Dreier.
On appeal from Superior Court of New Jersey, Law Division, Monmouth County.
Edgar Van Houten, appellant, filed a brief pro se.

John Kaye, Prosecutor of Monmouth County, attorney
for respondent (Mark P. Stalford, Assistant Prosecutor, of counsel and on the letter brief).

PER CURIAM

Defendant was found guilty in the Tinton Falls Municipal Court of operating a motor vehicle while under the influence of alcohol, contrary to N.J.S.A. 39:4-50 (DWI); refusal to submit to a breathalyzer, contrary to N.J.S.A. 39:4-50.2; speeding, contrary to N.J.S.A. 39:4-98; and reckless driving contrary to N.J.S.A. 39:4-96. The speeding and reckless driving offenses were merged with the DWI. Defendant was sentenced to two consecutive six-month suspensions of his driver's license for the DWI and the refusal. Additional fines and sanctions were imposed. Upon his de novo appeal to the Law Division, defendant was found not guilty on the DWI and reckless driving charges. He was again found guilty,

however, on the refusal and speeding charges. The same sentence was reimposed on the refusal, and defendant was sentenced to pay a fine of $50 for speeding. Suspension of defendant's license was effective August 9, 1991, and his request for a stay was denied.

On this appeal, defendant raises the following contentions:

I THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SPEEDING.

II THE STATE FAILED TO PROVE THAT THE DEFENDANT WAS UNDER THE INFLUENCE OF ALCOHOL WHICH AFFECTED HIS ABILITY TO DRIVE.

III THE DEFENDANT WAS NOT AFFORDED SUBSTANTIVE DUE PROCESS RIGHTS AND THERE EXISTED NO PROBABLE CAUSE FOR HIS ARREST.

IV THE DEFENDANT WAS NOT PROVIDED MIRANDA RIGHTS AND WAS PROHIBITED FROM CONSULTING HIS ATTORNEY.

A. THE DEFENDANT WAS CONFUSED BY THE CONFLICTING STATEMENTS

READ TO HIM AND DENIED HI SIXTH AMENDMENT RIGHTS TO AN ATTORNEY BY REFUSING HIM A SIMPLE PHONE CALL AND HIS FIFTH AMENDMENT RIGHTS TO REMAIN SILENT WERE DENIED.

B. THE FAILURE OF THE STATE TO ALLOW THE DEFENDANT A PHONE CALL BASED ON THE FACTS IN THE WITHIN CASE DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW.

V THE CONVICTION OF THE DEFENDANT OF REFUSAL AND THE SUBSEQUENT SENTENCE OF FINE, REVOCATION OF DRIVING PRIVILEGES IN THE STATE OF NEW JERSEY, AND REQUIREMENT OF 12 HOURS OF I.D.R.C. CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE VIII OF THE U.S. CONSTITUTION AND IS GROSSLY DISPROPORTIONATE TO THE SEVERITY OF 39:4-50.2.

The State's evidence revealed that on March 5, 1991, at approximately 8:00 p.m., Corporal David Nase of the Tinton

Falls Police Department was traveling southbound on Wayside Road when he observed defendant traveling in the northbound lane at what he believed was an excessive speed. Corporal Nase turned his patrol car around and stopped defendant. While speaking with defendant, Corporal Nase detected an odor of alcoholic beverage on defendant's breath. Defendant admitted that he consumed a beer.

Defendant was asked to get out of his car. When asked to perform the head tilt test for balance, he swayed and almost lost his balance. He also swayed when performing the heel-to-toe walking test. While performing the finger-to-nose test, defendant was "unable to touch his finger to his nose, and he was not bending his arm back and forth." Defendant was able to recite the alphabet only up to "P" before he "rambled on" and started "slurring the letters." His eyes were bloodshot. Based on the foregoing facts, defendant was arrested for DWI, read his Miranda warnings and transported to police headquarters.

While at police headquarters, defendant was asked to submit to a breathalyzer test. Defendant refused to take the test. Defendant testified that after he was given Miranda warnings, he thought he was entitled to a lawyer before submitting to a breathalyzer test. He testified that because he was not allowed to call an attorney first and Corporal Nase refused to call either of two requested by him, he refused to take the breathalyzer test. Defendant admits that Corporal Nase informed him that he did not have a right to a lawyer "with respect to the breathalyzer" which was part of paragraph 36 of a form read to defendant which he initialed. Defendant also admitted that he was informed that he was obligated to take the breathalyzer and the consequences of a refusal.

Based on our careful study of the record, we are entirely satisfied that all issues raised respecting the refusal are clearly without merit. R. 2:11-3(e)(2); State v. Bernhardt, 245 N.J. Super. 210, 213-217 (App. Div.), certif. denied, 126

N.J. 323 (1991). Based on the State's evidence of what transpired at the scene of the stop, which both courts below found to be credible, probable cause clearly existed to believe defendant had operated his motor vehicle while under the influence of alcohol. See State v. Bruzzese, 94 N.J. 210 (1983), cert. denied, 465 U.S. 1030, 79 L.Ed. 2d 695 (1984); State v. Burnett, 42 N.J. 377, 386-387 (1964); State v. Bates, 202 N.J. Super. 416, 422-423 (App. Div. 1985).

We are also persuaded that defendant was properly convicted of speeding. Corporal Nase testified that even without the use of his K-55 radar unit, it was his opinion that defendant was traveling in excess of the posted 40 miles per hour speed limit. He estimated that defendant was exceeding 50 miles per hour based on his observation of defendant's 1988 black Dodge Daytona vehicle. A lay witness may give an opinion on matters of observation. State v. Johnson, 120 N.J. 263, 294 (1990). Police officers are permitted to testify, pursuant to Evid. R. 56 (1),

respecting the speed of a motor vehicle "based on their personal observations and their long experience." State v. LaBrutto, 114 N.J. 187, 198 (1989). "It is clear that based on adequate visual observation an ordinary witness can state his conclusion of whether a car was moving fast or slow or give an estimate of its speed." Pierson v. Frederickson, 102 N.J. Super. 156, 162 (App. Div. 1968) (where lay testimony regarding speed was allowed based on the sound the vehicle made). In Pierson and the present case, the lay witness's testimony is based on his personal knowledge which the witness gained by means of his own senses. Visual perception and auditory perception are two good examples.

The judgment under review is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Signature: R. Emille Cox

CLERK

SUPERIOR COURT OF NEW JERSEY
COUNTY OF MONMOUTH: CRIMINAL DIVISION
MUN. APP. NO.: 139-91
APP. DIV. DKT. NO.: A-0342--91T3

STATE OF NEW JERSEY vs. EDGAR I. VAN HOUTEN, Defendant	TRANSCRIPT OF: MUNICIPAL APPEAL

TRANSCRIPT ORDERED BY: EDGAR I. VAN HOUTEN
August 9, 1991
Monmouth County Courthouse
Freehold, New Jersey
B E F O R E :
THE HONORABLE THEODORE J. LABRECQUE, JR., J.S.C.
A P P E A R A N C E S :
SPIRO MICHALS,
Legal Assistant,
Monmouth County Prosecutor's Office.
MICHAEL R. SPECK, ESQ.
Attorney for the Defendant.

MARY HEIMBUCH, C.S.R.
OFFICIAL COURT REPORTER
MONMOUTH COUNTY COURTHOUSE

THE COURT: Could I have your appearances, please?

MR. MICHALS: Spiro Michals for the State.

MR. SPECK: Michael R. Speck for the Defendant.

THE COURT: Alright, Mr. Speck.

MR. SPECK: Obviously, I submitted a brief in this case. Your Honor is aware of my opinion of the case. Judge, I just like to highlight a couple of things after reviewing the Prosecutor's brief. I just like to bring it to your attention. One of the interesting questions asked by Mr. Menzel of the police officer was whether or not--and this is specifically at page forty-one, line twenty-three of the transcript, whether or not the defendant's performance at the scene was consistent with his performance on the videotape in the office.

THE COURT: He said yes.

MR. SPECK: He said yes. I would indicate that the defendant at the scene had no problem saying the alphabet borne out on the videotape.

Judge, the other thing that concerns me is that the allegation the defendant was very rowdy. I watched the videotape and I saw some verbal jousting going on. It wasn't just the defendant but the police officer. Rowdiness is not a term I would use to apply to the particular videotape in question. Verbal joustings are possibly but it takes two and the police officer was part of the two in this case I think. What concerns me in the case is I viewed the videotape. I understand the reason for the stop and I am at a loss to term in my opinion that this defendant was under the influence of alcohol.

If we accept the premise that the defendant wasn't confused, that he knew exactly what he was doing, that just bolsters his theory that he wasn't under the influence. I think it was very clear the first thing he did after giving his Miranda rights is he asked for an attor-

ney. Now, obviously asking for an attorney doesn't mean much in the Tinton Falls Police Department because the police officer kept asking questions. Maybe they're not aware of Minnick v. Mississippi where all questions should stop upon the defendant asking for an attorney. That angers me. No matter what this defendant did in this case, this officer was going to go about his business. Attorneys make no difference.

This defendant, the only possible thing that I think your Honor could conclude he did wrong, on the videotape his speech wasn't slurred, didn't have problems communicating with the police officer. The only possible problem I could see was the heel to toe he raised his arms. Although I would indicate very specifically that the officer just said do it this way. Didn't describe the way he expected the heel to toe test to be conducted. Didn't tell the defendant not to raise his arms. His body slid a little bit, his feet didn't leave the line. The Defendant characterized under his testimony he

couldn't do that test, his body sways normally.

I find it very interesting when a defendant said pretty good for a sixty-four year old gentleman and the police officer said yes, you are right, pretty good. Now, if we are going to take defendant's admissions and use them against defendant, I think we better take the police officer's admissions and use them against the police officer. When you say something like pretty good, I think that it is hard then to turn around and say that he failed the test.

Obviously, your Honor has to consider the gentleman is sixty-four years old. Mr. Menzel asked the police officer, are there many other reasons for people not to be able to take the test perfectly? Police officer agreed there is no proof that alcohol affected the ability to drive in this case. In fact, there is no proof of speeding in this case, nothing. There is an allegation that he exceeded the speed limit but no proof to that effect.

THE COURT: Well, let me say this, there wasn't any proof until the Judge took over the questioning. The whole case came in and there wasn't any proof that he exceeded forty miles an hour. The Judge basically took over the questioning and the police officer basically said he was going in excess of fifty-five.

MR. SPECK: And that was an opinion that wasn't
backed up by proof.

THE COURT: It was based on his experience as the
operator of a motor vehicle. We all know that everybody can have an opinion.

MR. SPECK: Absolutely and I don't deny the police officer could and the defendant had an opinion that he wasn't exceeding the speed limit by any miles per hour. If we are going to have opinion, it has to go both ways. There is no special training.

I would like to attack one other thing succinctly. This alleged human

amount of training, this police officer had such, that he is able to divide people under the influence. He had a week and a half training eight years ago Judge. One-hundred-fifty DWI arrests. If I am going to take his word for one-hundred-fifty. We don't know how many people have been convicted. Let's assume that somebody is arrested. They're presumed not guilty. But be that as it may, I am arguing the point.

In terms of the confusion Judge, I really have a big problem with Judge Broadbelt's decision in that regard because I think what Judge Broadbelt was getting to, the defendant has to say some magic words, I am confused, before he can present that defense. I don't think that is what the Supreme Court envisioned. I think what the Supreme Court envisioned the Court making a determination concerning--one of the things they envisioned is that they should request an attorney which we all can agree that this gentleman did in this particular case. The Defendant, the gentleman took the stand and explained

his thought process. Maybe in some other cases we don't have that because the defendant doesn't elect to take the stand. But it was obvious that the defendant didn't trust this police officer.

THE COURT: That is something different. The confusion argument makes some sense in a factually confusing case where you can justify that. In fact, there was some confusion. The findings of the Court below were that there was no confusion factually. While legally that makes a great argument if the facts don't justify, then can't utilize the confusion argument on the refusal. As I understand that, your only attack on the refusal portion is the confusion argument.

MR. SPECK: We can agree that in State v. Levitt there is some inherent confusion between advising somebody they have a right to have an attorney and two minutes later saying they don't have a right to an attorney. There is inherent confusion. I think in Levitt the defendant can indicate he wanted an attorney which is what

happened in this case. The thing that stands out in my mind concerning that issue is when the Defendant said to the officer after he requested an attorney, gave him two attorneys' names, which I am sure your Honor is well aware, Mr. Horan who used to be a Municipal Court Judge in this County. I am not sure if the police officer knew he was an attorney but I knew he was an attorney. The officer just ignored the request. He just said well, we got some other papers to sign.

THE COURT: All of that goes to the issue of the conviction of 39:4-50, right?

MR. SPECK: I think it goes. I don't understand why somebody reads Miranda when you are not going to question the defendant. They have no responsibility--they can only do it for one reason to confuse somebody, not any other reason. It does go to a Judge. If a gentleman is sitting there and by the premise doesn't have a right to have an attorney, when you wait twenty minutes to warm up a machine, there is nothing lost by allowing somebody to

make a phone call. Be that as it may, if we buy the premise and our Appellate Division has said at least the officer should say where he thinks there may be some confusion, he should say look, I just read you something, I am going to read you something. I want you to listen very closely because in the things I am going to read says you don't have a right to have an attorney. Even though I said you have a right to have an attorney in the future when I say you don't have a right to have an attorney--

THE COURT: For something else.

MR. SPECK: For something else. You know what Judge, the most interesting thing, as soon as he determined he was a refusal, why was not a phone call allowed to an attorney? This officer kept this gentleman detained for a half hour.

THE COURT: For 39:4-50.

MR. SPECK: It is an inference that this police officer didn't really care about

this gentleman. Didn't care that this gentleman wants an attorney, that he may be confused about it. Judge, how can I unless somebody utters magic words, I am confused. Your Honor can only draw inference.

THE COURT: Or unless they exhibit some confusion and that is the nice part about having a videotape.

MR. SPECK: That I would agree with. I wish more towns would use it. I suspect there is a reason they don't.

THE COURT: So if I find in reviewing the videotape that in fact he was confused and you can do that looking at a videotape, you can find that, I am not saying in this videotape but looking at a videotape you can come to that conclusion and then the admonition in Levitt will apply. Okay, I understand the argument.

MR. MICHALS: Good afternoon, your Honor. The State's position is that the evidence was sufficient to support a

finding of driving while intoxicated. First of all the Officer observed the defendant speeding. He then pulled him over.

THE COURT: How fast was he going?

MR. MICHALS: According to him, he was above the speed limit. That was not properly established, I will admit that.

THE COURT: Was there anything wrong with his driving?

MR. MICHALS: Erratic? No. However, it was above the speed limit. You know your Honor, I mean in the sentencing report, it says fifty-seven miles per hour.

THE COURT: Who cares about the sentencing report? I care about the transcript.

MR. MICHALS: It was established I believe that the officer did state that he was sure based on his belief that the defendant was exceeding the speed limit. He turned around and pulled the defendant over properly. Asked him for his creden-

tials. While talking with the defendant, he detected the odor of alcohol. Based on this, he asked the defendant to go in front of the car or behind the car, I can't recall which, and performed four psychophysical tests. According to the officer they were performed unsatisfactorily. Based on this, read him Miranda rights, placed him in the patrol car and brought him to headquarters.

Again at headquarters on videotape, the defendant was asked to perform the same psychophysical and you could see, some unsatisfactorily. The alphabet was read quickly and there might have been a little slurring. Again, you can still be drunk and not exhibit total characteristics of being falling down drunk. Some of the tests, the hand to nose, inability to properly perform that. The heel to toe, he swayed and the head tilt, he was again swaying. Defendant alleges some excuses for his behavior, I believe his age and whatever else.

The State would cite State v. Corrado

which held a contributing factor of physical condition that rendered the defendant more susceptible to alcohol are not defenses. Therefore, the State would submit that the defendant was properly found guilty of D.W.I.

In regards to the refusal, in State v. Pandoli, the Court interpreted N.J.S.A. 39:4-50.2 in holding that a D.W.I. suspect has no right to counsel with an attorney prior to submitting to a breath test. This has been upheld.

The defendant here however maintains that he did have a right based on the confusion doctrine. As your Honor noted on the video, there was no mention of any confusion between the reading of paragraph thirty-six and the Miranda rights.

The defendant testified at trial that he was read the entire paragraph thirty-six and that he himself read paragraph thirty-six. I believe based on that it was a knowledgeable and voluntarily signing of that form which he said no which instantly put him in violation of that statute.

Defendant's brief also makes mentions of a phone call. The State would like to mention that he was allowed a phone call to his wife. Simply could have asked her to call up an attorney. Moreover, he mentioned that he had a problem with his daughter getting picked up. He asked the Corporal to make a phone call to Brookdale for him to make sure that his daughter was alright. The Corporal kindheartedly made the phone call and his daughter was notified. Based upon this, the State submits that the finding be upheld.

THE COURT: The Court below said one of the things relied upon in finding him guilty of 39:4-50 was his refusal to take the test, created an inference of his guilt of 39:4-50, what about that?

MR. MICHALS: That is proper. I believe as an inference, you can certainly use that. It shouldn't be used as a determining factor but--

THE COURT: It was used by the Court below.

MR. MICHALS: I believe that the Prosecutor below also asked the defendant why if he claims he wasn't drunk, why did he refuse? I don't know if I could find that at this time but that was also brought up, his possible explanation of why he refused. Then I believe it claims something--

THE COURT: The Magistrate at the end of his factual findings said just before he found him guilty of 39:4-50, he went right into that State against Tobias and talked about the inferences that he has drawn from that based on that opinion. My question is, is that an inference or is it a permissible inference?

MR. MICHALS: Good question, your Honor, I really am not sure. I would say without the inference, separate the inference, defendant was properly found guilty regardless of whether he said no to the breathalyzer or not. There is enough evidence based on the psychophysicals, the odor of alcohol. Second of all the defendant admitted at trial that he had

three beers.

THE COURT: Let me ask you this, the odor of alcohol, anybody who drinks a beer is going to have an odor of alcohol. I don't have to be any specialist to know that. Take judicial notice that one beer gives you the odor of alcohol and it stays with you. So, since he concedes he had one beer, obviously there was the odor of alcohol. Let me get back to Tobias, there are no mandatory inferences in the quasi criminal law, they are permissible inferences. I am satisfied that in this case it should not have been used because it is clear to me from viewing the videotape and his refusal that his refusal had nothing to do with his drinking. His refusal was flat out unconscious refusal. He wasn't going to cooperate with this police officer at all and it was deliberate. It had nothing to do with drinking. Had he not had a drink, I am satisfied that he would not have taken this test because he didn't trust the police officer. Under those circumstances where his refusal is explained by the looking at the videotape

and seeing the attitude of these two people over a period of thirty-five or forty minutes jousting with each other, I am satisfied that it was improper to utilize that inference of guilt. But you are saying notwithstanding all of that, that was enough?

MR. MICHALS: Yes.

THE COURT: Let me ask you this, police officer observed his operation of the motor vehicle. He observed him before as he was approaching him, he observed him as he passed him. He turned around and followed him and eventually stopped him. There isn't a shred of evidence that there was anything wrong with the operation of the motor vehicle, is there?

MR. MICHALS: Other than the speeding, no your Honor.

THE COURT: We don't even know how fast that was. At the very best, we could say he was going above forty beyond a reasonable doubt.

MR. MICHALS: Yes.

THE COURT: So there is not a shred of evidence and we also know that the guy was late to pick up his daughter.

MR. MICHALS: I believe that was mentioned, yes.

THE COURT: So there isn't a shred of evidence that the operation of the motor vehicle was affected by this violation of 39:4-50.

MR. MICHALS: Correct.

THE COURT: Got his credentials out without any problem, right? The officer testified that as far as the operation was concerned he was fine except that he was exceeding the speed limit. The officer also testified that what he did on video was substantially the same as how he did the physical tests at the roadside, right? No problem with the alphabet.

MR. MICHALS: A little quick.

THE COURT: Kids do it quickly too so they don't forget one. So, it really doesn't--this whole case really boils down to how I look at the physical tests.

MR. MICHALS: Well that and also the defendant admitted to having three Heinekens at three o'clock, 3:30.

THE COURT: Somewhere after 2:30 to 4:40.

MR. MICHALS: Yes.

THE COURT: And this is what, eight o'clock?

MR. MICHALS: This is eight o'clock. Then goes to a bar at a V.F.W. Post and allegedly had one beer.

THE COURT: And that is corroborated by two witnesses.

MR. MICHALS: Yes. The State would still submit.

THE COURT: Basically in a six hour period he had four beers basically.

MR. MICHALS: Yes. Your Honor, I see the problem, that based on the videotape he does not look drunk.

THE COURT: He doesn't. Didn't act drunk either, did he?

MR. MICHALS: Didn't act drunk either but I have seen videotapes where they didn't look drunk at all but blew a .2.

THE COURT: They don't have that. I am not and I am not going to say based on my experience .12, passed physical test, I am not going to say that. I have to look at the tape and just make up my mind, was this guy under the influence beyond a reasonable doubt so that he violated 39:4-50? And you know looking at the videotapes, a lot of it is in the eye of the beholder. Sometimes you see what you want to see and you don't see the things that you don't want to see. You don't want to see the successful part of a physical test, you

only want to see the unsuccessful. The case really boils down to those physical tests as being the only evidence.

MR. MICHALS: The alcohol on his breath, we have established that.

THE COURT: You have established the alcohol on his breath but anybody who has a beer is going to have alcohol on his breath. So, I wonder how important that is as a determining factor?

I am satisfied from my review of the videotape the man does not look like he was under the influence, didn't act like it and he is sixty-four years old and he did sway on heel to toe. When I say that, he put his arms up and he looked like he was on one of those balance beams where they're above the floor rather than on the floor. But he did the alphabet right and I think he did pretty well on the finger to nose test and putting your head back and closing your eyes for thirty seconds. The first couple of seconds swayed ever so slightly but after that hung in there for

the last twenty-five seconds pretty steadily. I have already said that in my opinion in this case that permissible inference should not have been drawn because it is clear to me that the reason he didn't take the test had to do with his relationship with the police officer. Had he had nothing to drink he wasn't going to take that test. He wasn't going to cooperate with him. Under those circumstances, I don't know how you can infer his guilt of 39:4-50. I am satisfied under all of the facts in this case that and I cite basically the impeccable operation of the vehicle, not stumbling for his credentials. The only thing you got is the odor of a beer on his breath and the fact that he concedes over a period of some six hours he consumed four hours before, three beers. Just before he got in the car to pick up his daughter at Brookdale he had consumed one beer at the V.F.W. I am satisfied based on that evidence that is not sufficient to find him guilty of a violation of 39:4-50, drunken driving.

Now concerning the confusion argument, there is no concern, there is no argument really made concerning the refusal, other than the confusion argument. Certainly under these facts, there can be no argument about his refusal. It was adamant, it was clear and there was probable cause for the police officer to ask him to take the breathalyzer test. Confusion is a great argument but it is obvious to this Court that this gentleman was not confused at all. He understood exactly what his rights were. He understood when he needed a lawyer and he also understood that on the refusal he wasn't entitled to a lawyer. Again for the same reason that I find that the inference shouldn't have been drawn, I find that he was not confused. He was not going to cooperate with this police officer no matter what. Whether he had a drink or not he knew exactly what he wanted and he knew exactly what he was doing and he was not confused at all. I certainly concur in the remarks of the Magistrate on that issue. It was clear and unmistakable and he violated the law. Therefore, because the confusion had

no factual basis in this case the argument that he was confused, it was belatedly raised at the time of trial, was properly set aside by the Magistrate after he had viewed the tape. Accordingly, I hold that his guilt of 50.2 is affirmed.

The finding of not guilty of 39:4-50 raises now the issue of the merger of the speeding. Mr. Speck, I will hear you about that. Speeding was merged.

MR. SPECK: Reckless was probably merged.

THE COURT: And reckless was merged with drunken driving and I am satisfied that there is no evidence of reckless driving here so I don't even want to address that issue. The issue is whether or not I should find him guilty of speeding.

MR. SPECK: If this were a typical case where the State had produced the proper proofs, I would probably concede the issue. But in this case, all we got is an indication that somebody was exceeding the

speed limit. Very basic to say, the least qualification to make that assumption. And we have rebuttal testimony that he wasn't exceeding the speed limit. I don't think the State even provided that beyond a reasonable doubt. This were the typical case I would stand moot but this is not the typical case.

THE COURT: Well you see no procedural problems you think it is you see. The problem you see, the problem as a problem of proof.

MR. SPECK: No, I don't have any problems. Procedurally Judges do that and in fact it is a benefit to a defendant. If there were not a proof problem, I would have no problem.

MR. MICHALS: I would submit there were proofs established below, the officer's training, experience, calibration of the machine that day were all brought up in the records.

THE COURT: Well there is not testimony

as to what the machine did. The only testimony is the oral testimony at the end of the police officer's testimony where the Court took over the questioning and established his expertise, his experience and asked him based on his experience how fast was he going? He said at least fifty and that is it, that is the testimony. There was no factual finding below as to whether or not he ever was. So, what I am doing here is a sua sponte.

MR. MICHALS: In that case the State would recommend possibly a remand for further testimony to be taken.

THE COURT: Everybody has been through paying lawyers. Judge Broadbelt doesn't want to see me again nor does he want to see Mr. Van Houten. No, I am just going to sua sponte decide the factual issue of the speeding.

MR. SPECK: So the record is clear, I have no objection to that.

MR. MICHALS: The State has no objection

either, your Honor.

THE COURT: Alright. There is evidence in the record from which the Court can find that the defendant was exceeding the speed limit. That evidence the Court finds is in there beyond a reasonable doubt and the Court finds him guilty of speeding fifty miles an hour in a forty miles an hour zone. On that matter the Court fines him $50.00. The Court will reimpose the same penalties on the refusal that were issued below and that is $250.00, the $25.00 costs, $1.00 to A.T.S. and twelve hours in the Intoxicated Driver Resource Center. I understand all of those fines were paid.

MR. SPECK: Judge, actually I was told that they weren't, but I think that Mr. Van Houten is trustworthy enough that he will pay them. My typical procedure is that they would be paid. Because of what happened in this case, he was found guilt absentia. Judge Broadbelt just placed this on the record until we got the transcript. There was an indication in

the transcript that the fines should be paid but I don't think they had been paid and I don't think that is Mr. Van Houten's fault. It was probably our fault because we probably didn't tell him. But the license suspension was stayed.

THE COURT: Those fines will be paid in the Municipal Court by Monday.

MR. SPECK: Thank you, Judge.

MR. MICHALS: And the license revocation?

THE COURT: The license revocation is as of today and my Court Officer will take his license. I will issue him a license to drive home.

MR. SPECK: I think he has a ride home. I don't know whether he wants to appeal it. I have certain opinions on that.

THE COURT: Quite alright. I am not going to stay that opinion.

MR. SPECK: That makes that easy.

THE COURT: I assume we are talking about the confusion issue and I am not going to stay the appeal for that.

MR. SPECK: Fine, Judge.

MR. MICHALS: Thank you, Judge.

THE COURT: Thank you.

* * *

C E R T I F I C A T E

I, MARY HEIMBUCH, Certified Shorthand Reporter of the State of New Jersey do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes, to the best of my ability.

DATE: 11/19/91
Signature: Mary Heimbuch
MARY HEIMBUCH, C.S.R.
OFFICIAL COURT REPORTER
STATE LICENSE NO.: X 100792

MUNICIPAL COURT

TINTON FALLS, N.J.

DOCKET NO.:

STATE OF NEW JERSEY -vs- EDGAR VANHOUTEN, Defendant	TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS

MAY 31, 1991

TRANSCRIPT ORDERED BY: FRANCIS X. MOORE, ESQ.

B E F O R E:

HON. EVAN W. BROADBELT, J.M.C.

A P P E A R A N C E S:

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EATONTOWN, NEW JERSEY 07724
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APPENDIX D-1

THE COURT: This is the matter of State versus Edgar Vanhouten, on motor vehicle complaints charging a violation of 39:4-50, drunk driving, and 4-50.2, refusal to take a breathalyzer test, 4-98, speeding, 57 in a 40 mile an hour zone, and 4-96, reckless driving.

The matter was tried before the Court on May 21st, 1991, and the Court reserved decision to review the video tape and review the briefs submitted by Counsel before rendering a decision.

(Tape off - tape on.)

THE COURT: The State in support of the complaints introduced the testimony of Corporal Nase, of the Tinton Falls Police Department, that on March 5th, 1991, at about 7:55 in the evening he was on routine patrol southbound on Wayside Road, that's in the Borough of Tinton Falls and the jurisdiction of this Court.

That he was operating a K-55 device as part of his routine patrol. The traffic

was light at that time, which he later determined as being operated by the defendant. He described the vehicle as a two-door 1988 Dodge, black in color, approaching him on Wayside Road, in an area where the posted speed limit is 40 miles an hour.

The officer testified that based upon his training and experience he observed the vehicle appearing to travel at a rate higher than 40 miles an hour. He estimated it around 50 miles an hour or so, or in excess of 50 miles an hour. And based upon that, although he did activate his K-55 and utilize that, the State did not present evidence with respect to that. When the vehicle went past him, and he was satisfied that it was exceeding the speed limit, he turned his patrol vehicle around, activated his overhead lights, and stopped the vehicle by the side of the road.

As he stopped, the defendant originally got out of his car to come back to the police vehicle. The officer instructed

him to get back into his car, which he did. And then he approached the defendant's vehicle while the defendant was seated in the driver's seat. The defendant was alone in the vehicle.

He asked him for his credentials. And when he did ask him for his credentials, he could detect an odor of an alcoholic beverage from the defendant's breath. He asked the defendant if he had been drinking. The defendant said that he was on his way to pick up his daughter at Brookdale College, and that he had had one beer.

And based upon that, Officer Nase asked the defendant to step out of the vehicle to perform certain psychophysical or balance tests. He was administering those on the black top on the side of the roadway. The first was a head tilt, in which the defendant was instructed to stand with his feet together, his hands at his sides, and tilt his head back for thirty seconds. He was observed by the officer to sway and almost lose his balance.

The second test was to recite the alphabet, which the defendant recited from A to P, and he rambled and was slurring his speech thereafter. He was then asked to walk heel-to-toe, five steps in one direction and turn and come four steps back, and when he did that, the officer observed him to be swaying.

He was then asked to touch the tip of his index finger to the tip of his nose. The officer testified that after giving him the instructions, and showing him how to do it, the defendant did not rotate his palms or his wrists as described. He didn't touch his nose as requested, and he wasn't bending his arms in the proper manner.

And based upon all of those observations, he arrested the defendant for drunk driving, advised him of his Miranda rights, and placed him in the patrol car. His recollection was that the defendant was not handcuffed.

Enroute to headquarters, after he called

in to advise that he had someone arrested, there was no conversation between either the officer -- between the officer and the defendant. And at headquarters he brought the defendant into the breathalyzer room, which is on video tape. And the State, with the consent of the defendant, introduced in evidence the video tape, which is S-1.

And, all of the incidents that occurred at headquarters, that the State relies in their complaints for the refusal, and the drunk driving charge, are contained on the video tape. The State also introduced in evidence S-2 which is the paragraph 36, which is the defendant's advice with respect to the breathalyzer, and the requirement that he submit to the breathalyzer test.

The officer testified that he read that to the defendant, and that the defendant filled in the answer, which is written in as no, and initialed that in his presence and on the video tape.

Based upon what the officer observed at the scene, and what he observed, which is shown on the video tape, summonses were issued for all four of the violations.

There was also introduced in evidence, by the State, S-3, which is the Miranda waiver, which was signed by the defendant, and it was also done on the video tape. S-4, the psychophysical testing at headquarters, the results which the officer indicated are shown on the video tape. S-5, the video tape breathalyzer procedures that were advised of the defendant prior to the start of the procedures near headquarters, and S-6, the psychophysical testing at the stop or at the scene, which are handwritten and filled in by the officer. That was also introduced as evidence.

The Court, after hearing all the testimony, did view the video tape on its own. And the video tape showed that the defendant initially when he came into the room asked the officer do I have a right to consult with an attorney? The officer

spoke with him and told him that he was going to read him certain procedures with respect to the breathalyzer test, and the other information.

And then read to the defendant the video tape advice, at which time the defendant said, I do insist on an attorney being here. He was then read paragraph 36. And the clear answer given by the defendant on the video tape, after being read paragraph 36, was, no. It wasn't a hesitation or I want to consult with somebody, or I want to call somebody. He said, no. He was then asked to sign it, and the Court observed him on the video tape signing S-2 in evidence, as indicated by the exhibit.

The defendant also said on the video tape that he had one beer to drink at the VFW between 6:45 and 6:55 p.m. on that date. And he also performed the psychophysical tests, reciting the alphabet. And the officer's opinion as to the recitation at headquarters was okay. The Court is satisfied that the defendant did

recite the alphabet properly.

The next test was the head tilt. The officer indicated that he was swaying and he did not complete thirty seconds. The Court observed that he did not do it for thirty seconds, and in addition there was a sway at the beginning of the stance before he steadied himself.

The next test was the heel-to-toe. The officer's explanation of how he did that was swaying, staggering and losing balance. The Court observed that the defendant had his arms out for balance, and he could not perform the walking heel-to-toe in any semblance of control. The entire time he was doing that he was quite off balance and wobbling.

And the last test was the finger-to-nose. The officer observed, and his explanation was that the defendant did it okay with his right arm, with his left arm he did not rotate the palm, did not bend his arm and return to the side properly. And that I am satisfied is an accurate opinion as to the manner in which the

defendant performed that finger-to-nose test.

The defendant offered testimony from Robert Withers, who testified that he's an Electronics Engineer. He's known the defendant for about five years, and he, Mr. Withers, is the Commander of the VFW Post. He saw the defendant at the VFW, at the bar, between 6:30 and 7 o'clock that evening. He didn't see the defendant drinking any alcoholic beverage. The defendant was standing at the bar the entire time that he saw him. And then in fact he pointed out the fact that the defendant rarely sits. And in his opinion was that the defendant was not drunk at the time. Although he did admit that the defendant is a trustee at the Post, and he, Mr. Withers, is the Commander, and they've known each other and they're friends. His opinion was that the defendant was not intoxicated.

Regina Underwood testified that she was the bartender at the VFW, has been for six years. The defendant came in around 6:30 in the evening. He had one bottle, one

twelve ounce bottle of Budweiser beer. She's known the defendant for the entire time she's worked there. His speech was clear, he had no problem walking, his eyes appeared okay, and in his opinion the defendant was sober and he left a little bit before 7 o'clock.

Josephine Vanhouten, who is the defendant's wife, testified that she had gotten home a little bit after 5 o'clock, and found the defendant was not there. When he was not home she decided to got out to shop for groceries, as is her custom. She came home a little bit after seven, and when she got home the defendant was at home, and he was eating some cheese and crackers.

She could tell the defendant had been drinking because her opinion is that when he drinks beer, just a couple of beers, his body gives off a very strong odor, which is very easily detectable that he's been drinking alcoholic beverages, and they don't keep alcoholic beverages in the house. They only bring it to the house, if

they're going to have a bottle of wine or something with a particular meal. But they don't keep alcoholic beverages in the house as a custom.

When speaking with the defendant, he realized that he had to go pick up his daughter at Brookdale College, and he left the house. She testified that she had seen the defendant intoxicated one time in their life. It was a long time ago. And in her opinion he was not intoxicated on that evening.

Her opinion was he had had a few beers, because he always smells that way. And the next time she saw him was at police headquarters and she was not really sure of the time. She estimated it was sometime after 8 o'clock, but she didn't know exactly when.

When she got to headquarters, the defendant appeared to be very white, was very upset. She expressed her opinion she thinks the arrest of the defendant was an outrage. And after she picked him up, he

didn't do a lot of talking about the incident, but they went to Brookdale to pick up their daughter. When they got there she was there with her boyfriend, John.

There was something wrong with John's car, and she observed the defendant and John push that car into a parking space. The defendant was upset. He wanted to get out of police headquarters, and be away from the whole situation. But in her opinion he was not intoxicated.

Lea Vanhouten, is the defendant's daughter. She testified that she was a Brookdale for some time waiting to be picked up by her father. He was supposed to be there at 7:30. She was told sometime afterwards, around 8:30 or so, by a Brookdale Police Officer, that her father is going to be a little bit late.

She was waiting with her boyfriend, who just happened to be there, when she was still sitting there waiting. And then his car would not run, so when the defendant

appeared with her mother, the defendant and her boyfriend, John Keenan, pushed the car about thirty feet.

She didn't have a lot of conversations with her father in the car. He was very quiet, the ride was very quiet, and she knew something was wrong, and they didn't discuss it that evening. Again, her opinion was that her father was not intoxicated.

John Keenan testified that he has known the defendant for about two years, since he's been dating the defendant's daughter. That he's twenty-one years old. That his father is an alcoholic. When he saw the defendant about 9 o'clock, he thought that he was completely sober, and the defendant helped him push his car. And in his opinion the defendant was not intoxicated when he saw him that evening after he had been released from police custody.

The defendant testified that he was operating his motor vehicle at the date and time, and location in question. He was on Wayside Road, and he was going at

about 40 miles an hour. He was on his way to Brookdale College to pick up his daughter.

When he saw flashing lights behind him he pulled over his Dodge Daytona and waited for the police car. When the police officer didn't get out of the car right away he then got out of his car to go to the police car to find out what was wrong, because he thought the car was -- he didn't think he was going to be stopped, he thought the police car wanted him to just get out of his way, because he was after someone else.

He was told to return to the car and sit in the car, which he did. He then asked why he was being stopped. And his testimony was that the officer said that he was going seven miles above the speed limit. He was then asked have you been drinking, and his answer was, yes, one beer, and then he was taken to the back of the car for tests.

The defense introduced into evidence D-

1, which is a photograph of the motor vehicle, D-2, 3 and 4, which are photographs of the side of the road, and the defendant's indication of where he took the balance tests right at the very edge of the roadway, and also near the storm drain.

The defendant said that he did the balance tests, when he did the head tilt in his opinion he did it okay, and there was nothing wrong with it. He said that when he did the finger-to-nose test, that he had no problem touching his nose, and he thought that the purpose of it was to touch the nose with the tip of the finger, and anything else was just extra. And he'd never seen anybody give instructions this officer had in terms of turning the wrists and rotating the wrists and the like.

With respect to reciting the alphabet, he said that he did go up to a particular letter, he didn't recall which one, and did stop. When he was asked to walk heel-to-toe, he said that he had an upper sway,

and he does that anyway, because he can't do a heel-to-toe walk at his age, and he's attempted to do that on exercise programs that he's been involved in and he just simply can't do it.

He testified that he was never given any Miranda rights by the officer. He asked for a lawyer, he wanted to call either Larry Carton or Ron Horan. He was shown S-2 or looked at S-2 evidence, which is the paragraph 36. He remembers it -- his testimony was he remembers it being read to him, and then it was handed to him, and he read it, and after he read it he answered no. And his reason that he gave in testifying before this Court was he refused because he had asked for a lawyer and he wasn't going to sign anything, and he wasn't going to take any tests unless he had his lawyer there.

He testified he was extremely suspicious of this police officer. He thought that this officer -- he suspected this officer's motives. He was very angry at this officer, because the officer said

that he felt that he had saved the defendant's life, and the officer was just simply out to get him because he was not intoxicated, was not doing anything wrong, in his opinion was not even exceeding the speed limit.

On cross examination, the defendant testified and evidence was introduced for the first time, that earlier in the day the defendant had been consuming alcoholic beverages. He testified that he had been up to the Lion's Hospital with his brother earlier in the day, and had lunch with his brother there. He didn't have any alcoholic beverages there.

But when he returned his brother home to the Keansburg area, he met a friend called Carl, to talk about some real estate matters, that he was interested in. And from 2:30 to 3:30 he sat at a bar in Keansburg with Carl, and had a few beers. When pressed at to how many, he testified that he had three, and he testified that they were twelve ounce Heinekens.

He testified that he never told the police officer about those beers, because in his opinion they were consumed well in advance of the time he was driving the vehicle, and had no effect on the charges against him.

The -- in terms of the four charges against the defendant, it is appropriate to determine first whether there is sufficient proof to establish the violation of a refusal to take the breathalyzer test. Because the burden, with respect to that charge is different, it's proof by a preponderance of the evidence, and that statute provides under 39:4-50.4, that the Municipal Court shall determine by a preponderance of the evidence, whether the arresting officer had probable cause to believe that the person had been driving a motor vehicle on the public highways of this State, under the influence of intoxicating liquor.

Whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer.

And if these elements of the violation are not established, no conviction shall issue.

The State is required therefore to prove three elements by preponderance of the evidence. They are, that the defendant was operating a vehicle while under the influence, or that the officer had probable cause to believe that. Two, that the person was placed under arrest, and three he refused to submit to the test.

I am satisfied that it is clear, firstly as to the probable cause issue, as the Court previously found during the probable cause hearing of this trial, that the officer had probable cause to stop the vehicle. He made a routine observation based on his training and experience that the defendant's vehicle was speeding, and made the stop for that reason.

Having done that, he detected an odor of alcoholic beverage on the defendant's breath. Asked the defendant if he had been drinking. The defendant said that he

had one beer. The officer then administered certain psychophysical tests, which based upon the performance that the defendant gave, led the officer to believe that the defendant was under the influence.

So, I'm satisfied that he had probable cause to believe that the defendant was driving the vehicle, that he was under the influence at the time he was driving the vehicle. Two, that he was placed under arrest, he was taken into custody. There's no question about that. And, three, he was read paragraph 36, and the defendant's answer was clear and concise. He was read the paragraph 36. He was asked if he would take the test. His answer was, no.

The officer said, on the video tape, excuse me, and the defendant said, no. He then wrote in on the answer blank, no, and initialed it. At no time did the defendant ever say I don't understand those rights, I'm confused by those rights, you told me earlier I had a right to have an attorney, how come I can't have

a lawyer here while I'm taking this? You're getting me confused, I don't understand this.

All of the arguments set forth in the defendant's brief, with respect to the quote, confusion, unquote issue are inapplicable to this fact pattern, because the defendant never said he was confused. The only time the defendant said he was confused was on the witness stand when he testified before this Court. And then for the first time he said he was confused. Never in the entire time that he was on the video tape, did he ever express any confusion with respect to the rights that were given to him, with respect to the breathalyzer test. And, parenthetically, he did not read the paragraph 36, as he testified he read it. The video tape shows that it was read to him, he gave his answer and then signed it and did not read it separately himself.

So I am satisfied that there clearly is a violation of 39:4-50.2. The defendant refused to submit to breathalyzer tests.

I'm satisfied that it's not a question of preponderance of the evidence. It was absolute proof beyond any reasonable doubt that he refused to take the breathalyzer test after he was properly advised of his right to -- his obligation to do so. And, accordingly on the refusal to take the breathalyzer test I will find the defendant guilty.

The charge of drunk driving requires proof beyond a reasonable doubt that the defendant was operating a motor vehicle while under the influence of an alcoholic beverage. There are no readings from a breathalyzer, so therefore, there's no per se issue before this Court. The issue clearly is, was the defendant's ability to operate a motor vehicle deleteriously affected by the consumption of alcoholic beverages?

This is, as the officer testified, a motor vehicle stop that was initially a routine stop for speeding, 57 in a 40 mile an hour zone. There was nothing untoward about the operation of the vehicle, other

than the speeding. He didn't testify the vehicle was swerving down the road, or going across the center line, or onto the fog line, or any of that trained testimony that is often heard in drunk driving cases. It was just simply a speeding stop.

Having stopped the defendant, the officer, however, noticed impairments of the defendant, and the odor of alcoholic beverage, strong odor of alcoholic beverage, which in fact was confirmed by the defendant's wife, that he had a strong odor of alcoholic beverage on him. And her opinion that he had a few beers, not one beer.

The defendant steadfastly testified that he had one beer. In point of fact when he was cross examined, he admitted to having three beers a few hours earlier, between -- his recollection was between 2:30 and 3:30. But we know now, the Court knows now the defendant had at least four beers from the period of 2:30 until 7:55 when he was stopped. And that's from the

defendant's own testimony.

I am certain that his wife, and his daughter and his daughter's boyfriend are all going to say that he was not intoxicated. I sincerely doubt that Mrs. Vanhouten, who testified that she's not a barlady, really has a clear ability to determine when someone is intoxicated, and when they are not.

I am equally satisfied that a police officer, who is trained in school and experienced, as Officer Nase, with some 150 drunk driving arrests, has a much better ability to make a determination if someone is under the influence of alcohol than 21 year old John Keenan, regardless of the fact that his father was an alcoholic, or Ms. Vanhouten, the defendant's daughter.

The observations made, and I'm sure that both Mr. Withers and Ms. Underwood believed that the defendant was not intoxicated, but the ability to observe him, I am satisfied that they had was clearly

much less determinative of the defendant's condition than the officer. Mr. Withers said that he didn't see the defendant drink at all. He only saw him for fifteen or twenty minutes. So, how closely did he observe him, if he was there for fifteen or twenty minutes, and we know the defendant drank one beer. And Mr. Withers never saw him drink that beer.

I find it highly unlikely that he made any clear, and lasting observations that can be really probative of whether or not the defendant was intoxicated other than his opinion that he wasn't falling down drunk at the bar.

Ms. Underwood served the defendant one bottle of Budweiser. It's unclear to this Court about how long she observed him, or spent any time with him as well with other patrons in the bar. But I'm satisfied that, you know, her opinion again, is not dispositive, because of the limited period of time that she had to observe the defendant.

Officer Nase, on the other hand, had a clear opportunity to administer physical balance tests to the defendant, on the road and also in headquarters. And the Court has viewed the video tape. There is a substantial period of time, because of the loud hum that's on that video tape, where the defendant is talking in a very low tone to the officer, and it's very difficult to discern everything that's said by the defendant in that segment of the tape.

But, there is one point in time where it apparently is suggested to the officer that he turn the tape off, so that the defendant can talk to him or something. And, there is a clear tone to this case that the defendant had his own agenda for that evening, that he was being most uncooperative with Officer Nase. And Officer Nase acted, this Court is satisfied, in a completely entirely professional manner, in a courteous manner with this defendant, and did not receive that kind of courtesy in return.

I am satisfied, based upon the observation of the video tape, and the defendant's inability to walk heel-to-toe, his inability to follow instructions on touching the tip of his nose, and his general demeanor, and also his admission that he had three other beers, that came from the witness stand, for the first time in this case, that the defendant was under the influence of an alcoholic beverage. That he was unfit to operate a motor vehicle at the time he was stopped by the officer.

And, I say that based upon, not only the physical performance of the defendant on the video tape, the testimony as to the additional alcohol which he consumed, but also based upon State v. Tabisz, which permits the Court to draw a reasonable inference from a refusal to take a breathalyzer test by a defendant. This defendant's refusal was clear and unequivocal. He said, I'm not taking the breathalyzer test. The answer is no. Not I'm confused, not I don't understand, no.

And that type of refusal, I am satisfied can be used as an inference of guilt against this defendant in the circumstances of this case.

I'm satisfied that the defendant is guilty of a violation of 39:4-50, of drunk driving, beyond any reasonable doubt, and accordingly I will find the defendant guilty of that violation as well.

With respect to the speeding charge, as well as the reckless driving, I am satisfied that each of those complaints would merge as a matter of law, and I will enter findings of not guilty based upon the doctrine of merger as to each of those.

I have reviewed a certified abstract of the defendant's driving record. I am satisfied it is his first conviction for both the refusal to take the breathalyzer test, and also the drunk driving charge. And, accordingly on each of -- on the refusal to take the breathalyzer test, I'll impose a fine of $250.00, $25.00 costs, $1.00 to the ATS. I'll revoke the

defendant's driving privilege in the State of New Jersey for a period of six months. It's effective immediately. And, I'll direct that he serve twelve hours in the Intoxicated Driver Resource Center under the supervision of the State Bureau of Countermeasures.

On the drunk driving charge, I'll impose a fine of $250.00, $25.00 costs, $1.00 to ATS. There will be an additional fine of $100.00 paid to the Drunk Driving Enforcement Fund, $30.00 to the Crimes Compensation Board. I'll revoke the defendant's driving privilege on the drunk driving charge for a period of six months. That's consecutive to the six months of the refusal. And again, I'll direct you to serve twelve hours in the Intoxicated Driver Resource Center. They should be concurrent with each other. It shouldn't be 24 hours, but a twelve hour period at the IDRC.

The Clerk is directed to notify the defendant through Counsel of the findings of the Court and the penalty imposed. And

also to forward to Counsel the IDRC penalty provisions order for the defendant's signature, and the notice to the defendant following a conviction for the enhanced penalties to be signed by the defendant. And, also advise Counsel of the right to appeal within twenty days, and that if Counsel wishes to file the notice of appeal, he may do so, and the Court will entertain an application to stay the revocation of the license of the defendant for that period, but not any other penalties.

Court's adjourned.

* * *

STATE OF NEW JERSEY:

: SS

COUNTY OF MONMOUTH :

I, THERESA GRIBBEN, Certified Tran-

scriber, do certify that the foregoing is a true and accurate transcript of the proceedings in the matter of State versus Edgar Vanhouten, heard in the Tinton Falls Township Municipal Court, on May 31, 1991 and recorded on Tape No. 1, Index Nos. 0000 to 919 of that Court.

DATE: 7/24/91

Signature: Theresa Gribben

THERESA GRIBBEN

Witness:

Signature: Teresa Borucki